LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
APR 19 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 835

ROBERT KENNETH DEWEY,

Petitioner,

v.

REYNOLDS METALS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

PAUL S. BERGER
JOSEPH B. ROBISON
Attorneys for
American Jewish Congress, *Amicus Curiae*
15 East 84th Street
New York, New York 10028

BEVERLY COLEMAN
Of Counsel

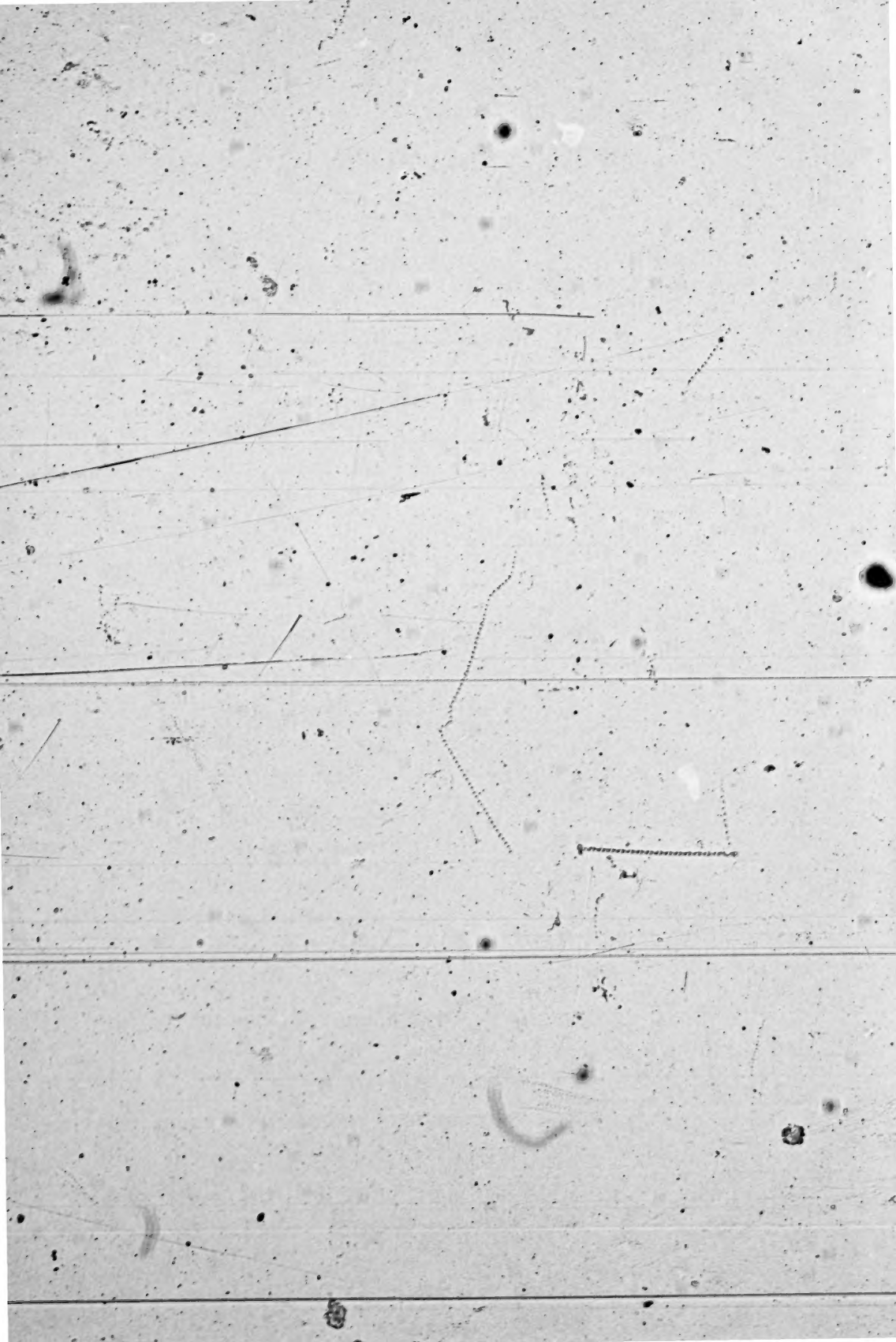

TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
Question to Which This Brief is Addressed	4
Statutory Provision Involved	4
Summary of Argument	4
Argument	6
I. The EEOC's interpretation of the Civil Rights Act of 1964 protecting the rights of Sabbath observers is entitled to great weight	7
II. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 may be violated by employment practices which, although applicable to all employees, have a discriminatory exclusionary effect on specific religious groups	10
A. The prohibition of discrimination in Title VII includes acts having a discriminatory impact	10
B. Other prohibitions of discrimination have been construed as applying to acts that have a discriminatory impact	11
1. Discrimination among religions under the Freedom of Religion Clause of the First Amendment	12
2. The constitutional guarantee of equal protection	13
3. Decisions under the National Labor Relations Act	14

PAGE

III. This Court should uphold the EEOC's interpretative ruling concerning the employment of Sabbath observers 17

A. The 1967 Guidelines 17

B. The 1966 Guidelines 21

Conclusion 23

TABLE OF AUTHORITIES

Cases:

American Newspaper Publishers Association v. Alexander, 294 F. Supp. 1100 (D.D.C., 1968) 7, 9

Brewster v. Gage, 280 U.S. 327 (1930) 8

Griffin v. Illinois, 351 U.S. 12 (1956) 13

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 14

Hawkins v. Town of Shaw, —— F. 2d —— (5th Cir., decided January 28, 1971) 14

NLRB v. Erie Resistor Corporation, 373 U.S. 221 (1963) 8, 16, 17

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) 17

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) 17

NLRB v. Hearst Publications, 322 U.S. 111 (1944) 8

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) 8

Phillips v. Martin Marietta Corporation, 91 S.Ct. 496 (1971) 9

Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396 (1961) 8

PAGE

Radio Officers Union v. NLRB, 347 U.S. 17 (1954) 15, 16
Republic Aviation Corporation v. NLRB, 324 U.S. 793 (1945) 15

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 12, 19
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 8

Udall v. Tallman, 380 U.S. 1 (1965) 8, 9
Unemployment Compensation Commission of Alaska v. Aragan, 329 U.S. 143 (1946) 10
United States v. American Trucking Assoc., 310 U.S. 534 (1940) 8
United States v. Ballard, 322 U.S. 78 (1944) 20

Weeks v. Southern Bell Telephone, 408 F. 2d 288 (5th Cir. 1969) 8

Zemel v. Rusk, 381 U.S. 1 (1965) 8

Other Authorities:

Attorney General's Committee on Administrative Procedure, Final Report (1941) 7
Lamb, "Proof of Discrimination at the Commission Level," 39 TEMPLE LAW QUARTERLY 299 (1966) 18
National Labor Relations Act, Sec. 8(a)(3), 29 U.S.C. §158(a)(3) (1958 ed.) 5, 14
Note: "An American Legal Dilemma—Proof of Discrimination," 17 U. of CHI. L. REV. 107 (1949) 18

IN THE

Supreme Court of the United States

October Term, 1970

No. 835

ROBERT KENNETH DEWEY,

Petitioner,

v.

REYNOLDS METALS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

This brief is submitted by the American Jewish Congress, *amicus curiae*, conditionally upon the granting of the motion for leave to file to which it is attached. The interest of the American Jewish Congress is set forth in that motion.

Preliminary Statement

Petitioner Dewey was employed by the respondent Reynolds Metals Company for fifteen years prior to his discharge in 1966. In 1960 and in subsequent years, the collective bargaining agreement between Reynolds and the United Automobile Workers, of which Dewey is a member, permitted the company to set overtime schedules and required employees to work such schedules unless they had a substantial and justifiable reason for not doing so.

In 1961, Dewey became a member of the Faith Reformed Church, which forbids Sunday employment. It was not until late 1965, however, that the Reynolds plant began to operate on a "six-plus" week, which meant regularly scheduled Saturdays and numerous Sundays. Under this schedule, Sunday overtime became compulsory for the employees. In September 1965, Reynolds issued an interpretation of the Labor Agreement which permitted an employee scheduled for overtime to obtain a qualified replacement. Dewey found substitutes for five assigned Sundays between January and August 1966. However, on August 28, September 4 and September 11, he refused for religious reasons to ask others to work in his stead. Because of his refusal to obtain replacements, he was discharged on September 12, 1966.

Dewey began grievance proceedings following his discharge, eventuating in an arbitration award on June 29, 1967, holding that respondent had not violated the union

contract. On September 15, 1966 Dewey filed a charge of discrimination with the Michigan Civil Rights Commission which found insufficient grounds to issue a complaint. On January 4, 1967, Dewey filed a charge with the Federal Equal Employment Opportunity Commission (EEOC), which found reasonable cause to believe Reynolds had engaged in an unfair employment practice under Section 703(a)(1) of Title VII ("Equal Employment Opportunities") of the Civil Rights Act of 1964 (42 USC 2000e-2). Thereafter, he was informed by the EEOC that its efforts at conciliation had failed and that he could file suit under Section 706 of Title VII (42 USC 2000e-5(e)). Accordingly, Dewey filed this suit in the U.S. District Court for the Western District of Michigan.

The District Court, relying upon this Court's decision in *Sherbert v. Verner*, 374 U.S. 398, and the Commission's Guidelines on Discrimination Because of Religion, issued July 10, 1967, 29 C.F.R. 1605.1, 32 Fed. Reg. 10298-9, held that Reynolds' discharge of Dewey constituted religious discrimination in violation of Title VII. The Court of Appeals for the Sixth Circuit, with one judge dissenting, reversed, finding nothing discriminatory in Reynolds' compulsory overtime rule. The majority held that the District Court should have applied an earlier version of 1605.1, adopted in 1966, and that Reynolds had complied with that regulation. Even under the 1967 regulation, Reynolds was thought to have made a reasonable accommodation to the religious needs of its employees by its replacement system. Finally, the court held that, under Title VII, suit may not be brought after a grievance has been finally adjudicated by arbitration.

Question to Which This Brief is Addressed

This brief is addressed solely to the question whether petitioner's discharge for a refusal to work overtime on Sunday or to request an employee to take his place is discrimination in employment because of religion as proscribed by Title VII of the Civil Rights Act of 1964.

Statutory Provision Involved

Section 703 of the Civil Rights Act of 1964 (42 USC 2000e-2) provides in part as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

Summary of Argument

I. The EEOC's interpretation of the rights of Sabbath observers under the Civil Rights Act of 1964 is entitled to great weight. The courts have consistently paid deference to the interpretative regulations of administrative agencies. The interpretation of the 1964 Act here under review is a contemporaneous effort by the men charged with its administration to give content to the statutory prohibition of discrimination and to insure achievement of the legislative purpose. To sustain the EEOC's interpretation of the statute, the Court need find only that it was reasonable.

II. The statutory prohibition of discrimination in employment may be violated by practices that have a discriminatory exclusionary effect on specific religious groups.

A. The statutory prohibition includes acts having a discriminatory impact. If the employer need not give his employees reasonable opportunity to practice sincerely held beliefs, the statutory protection against discrimination on the basis of religion would be substantially reduced. It was therefore appropriate for the EEOC to look to the impact of the employer's policy on adherents of a specific religious group and not to limit itself solely to the question whether the employer had adopted a rule that applied equally to all employees.

B. Other prohibitions of discrimination have been construed as applying to acts that have a discriminatory impact. This is true of the prohibition of discrimination among religious groups under the Freedom of Religion Clause of the First Amendment. It is true also of the prohibition of discrimination contained in the constitutional guarantee of equal protection.

Finally, the prohibition of discrimination contained in the National Labor Relations Act, which closely parallels that of the Civil Rights Act of 1964, has similarly been construed as prohibiting discrimination having the effect of discouraging or encouraging union membership, even absent a discriminatory intent on the part of the employer.

III. A. The Guidelines adopted by the EEOC in 1967 were consistent with the principles outlined above and constituted a reasonable interpretation of the statute. They represented a reasonable balance between the needs of em-

ployers and the statutory objective of equality. The employer here was required to make only a small accommodation to the religious beliefs of the petitioner. It was prepared to accept substitutes for those employees who could not work on Sunday and therefore was required only to relieve petitioner of the duty of finding such substitutes.

The court below appears to have found not only that this requirement was unreasonable but that the petitioner's religious beliefs were unreasonable. This constituted an improper intrusion by the court upon the realm of religious belief.

B. Even if the court below properly found that this case was governed by the Guidelines adopted by the EEOC in 1966, rather than those of 1967, the same result should be reached. Under both regulations, the EEOC made a reasonable judgment as to the requirements imposed by the statute on employers. According to their express terms, the 1966 Guidelines clearly prohibited petitioner's discharge.

Argument

The decision of the Court of Appeals rested primarily on its conclusion that the Federal law barring discrimination in employment—Title VII of the Civil Rights Act of 1964—does not apply to the kind of situation here involved. It held that the statutory prohibition of discrimination is not violated when an employer adopts a rule applicable to all employees, even though it has the effect of excluding from employment members of those religious sects that observe a particular day of the week, or any day of the week, as a day

of rest. This holding is fundamental to the decision below, even though there are subsidiary issues, and it is to that holding that we address our argument here.

I

The EEOC's interpretation of the Civil Rights Act of 1964 protecting the rights of Sabbath observers is entitled to great weight.

In the case of a statute such as Title VII, "where emphasis is placed on voluntary compliance with the requirements of nondiscrimination, and where there is a general lack of guiding precedent, the promulgation of reasonable interpretive guidelines" is of particular importance. *American Newspaper Association v. Alexander*, 294 F. Supp. 1100, 1103 (D.D.C., 1968).[1]

Interpretative rulings do not have the same basis in law as regulations issued under express statutory authority. Indeed, the Attorney General's Committee described the latter as "legally binding." Final Report, *supra*, at 100. However, it went on to say (*ibid*):

> This distinction between statutory regulations and interpretative regulations is, however, blurred by the

1. The authority of the EEOC to issue and apply interpretative guidelines is not in question in this case. It is a settled principle of administrative law that, "In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so." Attorney General's Committee on Administrative Procedure, Final Report 99 (1941). The statutory authority of the Equal Employment Opportunity Commission to "issue, amend, or rescind suitable procedural regulations," conferred by Section 713(a) of the Act (42 U.S.C. 2000e-12) is therefore augmented by the agency's inherent power to issue interpretative regulations which may or may not be given the force of law by the courts.

> fact that the courts pay great deference to the interpretative regulations of administrative agencies especially where these have been followed for a long time.

In support of that statement, the Committee cited this Court's statement, in *Brewster v. Gage*, 280 U. S. 327, 336 (1930) that

> * * * it is the settled rule that practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons.

This principle of judicial "deference" has been repeatedly applied by this Court. *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U. S. 396 (1961); *NLRB* v. *Hearst Publications*, 322 U. S. 111 (1944); *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944); *United States* v. *American Trucking Assoc.*, 310 U. S. 534 (1940). See also the discussion below (pp. 16-17) of *NLRB* v. *Erie Resistor Corporation*, 373 U. S. 221 (1963).

This Court has stated further, in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933), that respect is particularly due when the practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." The 1966 and 1967 Guidelines issued by the Equal Employment Opportunity Commission were a virtually contemporaneous effort by the men charged with the administration of new Federal machinery to give content to newly enacted statutory prohibitions against discrimination in employment and to insure

that the Act served its legislative purpose. In 1966 and again in 1967, faced with complaints filed by "Sabbath observers," the Commission found it necessary to relate the general language of the statute to the rights of such individuals before it. Its expatiation upon the bare-boned statutory prohibition against discrimination with respect to this group whose religious practices conflict with the rules imposed by their employers is entitled to more weight than was given it by the Court of Appeals.

The EEOC guidelines on discrimination on the basis of sex were given decisive weight in *Weeks* v. *Southern Bell Telephone*, 408 F. 2d 228, 235 (5th Cir. 1969), largely on the authority of *Udall* v. *Tallman, supra*. See also Justice Marshall's concurring opinion in *Phillips* v. *Martin Marietta Corporation*, 91 S. Ct. 496, 498 (1971).

Finally, the correct judicial posture towards an EEOC guideline was set forth in a case upholding EEOC guidelines concerning job opportunities advertising. *American Newspaper Publishers Association* v. *Alexander, supra*. Said the court (294 F. Supp. at 1103):

> When Section 713(a) and (b) of Title VII are read together it is apparent that Congress intended that the Commission should have the authority to issue and publicize its interpretations of the meaning of the provisions of Title VII. The promulgation of interpretative guidelines is a necessary function of an agency which is entrusted with the duty of administering a statute.

While recognizing that the guideline was not binding upon it and that it was free to interpret the statute differently, the Court went on to conclude that the guideline formulated

represented a reasonable interpretation of the statute and that it was within the Commission's authority.

To sustain the Commission's interpretation of the statute it administers, this Court need not find that the agency's construction is the only reasonable one, or even that it is the result which would necessarily have been reached had the question arisen in judicial proceedings in the first instance. Rather, if the Commission's interpretation is a reasonable one, it should be upheld. *Unemployment Compensation Commission of Alaska* v. *Aragan*, 329 U. S. 143, 153-154 (1946).

II

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 may be violated by employment practices which, although applicable to all employees, have a discriminatory exclusionary effect on specific religious groups.

A. The prohibition of discrimination in Title VII includes acts having a discriminatory impact.

The basic legislative objective of Title VII is to prohibit discrimination by private employers on the basis of an employee's race, color, religion, sex or national origin. If an employer need not give his employee reasonable opportunity to practice sincerely held beliefs, assuming no undue burden is placed upon the conduct of the employer's business, the protection provided by Title VII against discrimination on the basis of religion would be substantially reduced.

We submit, therefore, that the District Court properly looked to the impact of the respondent's policy on the employment of the adherents of a specific religious group and declined to limit itself to the sole question whether respondent had adopted a rule that applied equally to all employees.

This interpretation of the meaning of "discriminate" as used in Section 703(a)(1) is strengthened by the provisions of Section 703(h), which limits the scope of 703(a)(1) in one respect. It permits an employer to give, and act upon the results of, an ability test, provided that "such test, its administration or action upon the results is not *designed, intended or used* to discriminate * * *" (Emphasis supplied.) This section thus recognizes a distinction between designed and intended discrimination and discrimination resulting from usage absent the element of intent, and recognizes also that both are covered by Section 703(a)(1).[2]

B. Other prohibitions of discrimination have been construed as applying to acts that have a discriminatory impact.

The interpretation of Section 703(a)(1) urged above is not novel. This and other courts have generally construed

2. We submit that the Court of Appeals erred in basing its decision in part on Section 706(g) (42 USC Section 2000e-5(g)) which provides that the District Court, upon application, shall enjoin an unlawful employment practice if it finds that the employer "has intentionally engaged in" such a practice. There is no reason to believe that this language requires the court to ascertain anything more than that the employer intended to engage in conduct which violates the statute—and there is, of course, no question here that respondent intended to apply a policy of employment that excluded persons holding petitioner's religious beliefs. The interpretation apparently applied by the court would make some types of discriminatory practice subject to court order while leaving others beyond the reach of the courts.

constitutional and statutory prohibitions of discrimination as applying to actions having a discriminatory impact, even when there was no showing of a discriminatory intent. It is entirely appropriate, we submit, to consider those decisions as applicable here because they illuminate the meaning of discrimination as used in our law generally. They represent a general trend in the law toward treating discrimination as an evil that requires correction regardless of its origin. Indeed, these cases, by shifting emphasis from intent to effect, establish the general principle that discrimination is independent of malice.[3]

1. *Discrimination among religions under the Freedom of Religion Clause of the First Amendment.* A leading case which defines discrimination on the basis of religion so as to encompass rules discriminatory in effect, though not in motivation, is *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Sherbert*, rejecting the argument (also made by respondent here) that a rule applied equally does not discriminate, this Court held (at 403-4):

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact. * * * But this is only the beginning, not the end, of our inquiry. For "/i/f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate individually between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Braunfeld v. Brown, [366 U.S. 599, 607 (1961)].

3. The fact that this trend has developed along parallel lines under different prohibitions of discrimination may be a belated recognition in our post-Freudian times that intent has both conscious and unconscious components, and that unconscious factors are difficult to elicit.

The court below dismissed *Sherbert*, in a single sentence, on the ground that it involved state, not private action (Pet. App. 47a).* This, we submit, cannot conclude the matter. *Sherbert* is relevant because of its definition of *discrimination*, particularly in the context of religious practices. As the District Court correctly pointed out: "The importance of *Sherbert* to this analysis is not its holding on constitutionality, but its definition of discrimination—a definition which is equally valid whether employed to measure private or state action" (Pet. App. 25a and 26a).

2. *The constitutional guarantee of equal protection.* This Court has frequently held that intent is not a necessary element in sustaining a claim of denial of the guarantee of equal protection contained in the Fourteenth Amendment. Thus, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), it considered the validity of a state statutory requirement that persons appealing convictions furnish a bill of exceptions or report of proceedings in the trial court, a requirement that frequently included the necessity of supplying a stenographic transcript of the trial. This requirement had the effect of discriminating against poor persons who could not afford the expense of obtaining a transcript. There was no suggestion that the requirement was designed to deprive poor persons of the right to appeal. Yet this Court held that it constituted a denial of equal protection. It said (at 17, n. 11):

> Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, this Court struck down the so-called "grandfather clause" of the Oklahoma Constitution

* References to (Pet. App.) are to the Appendix to the Petition for Certiorari.

as discriminatory against Negroes although that clause was by its terms nondiscriminatory. Guinn v. United States, 238 U.S. 347, 35 S. Ct. 926, 59 L.Ed. 1340. See also Lane v. Wilson, 307 U.S. 268, 59 S. Ct. 872, 83 L.Ed. 1281.

Similarly, in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 666, n. 3 (1966), in invalidating Virginia's poll tax, this Court said that, although the "'Virginia poll tax was born of a desire to disenfranchise the Negro'" (*Harman* v. *Forssenius*, 380 U.S. 528, 543), we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end."

The most recent example of the focus upon effect in Equal Protection cases is *Hawkins* v. *Town of Shaw*, —— F. 2d —— (5th Cir., decided January 28, 1971). In that case, the Fifth Circuit Court of Appeals held that a Mississippi town must provide equal services to Negro residents, even though the record contained "no direct evidence aimed at establishing bad faith, ill will or an evil motive on the part of the Town of Shaw and its public officials."

3. Decisions under the National Labor Relations Act. The courts have also looked beyond the requirement of intent or the claim of uniform application in cases arising under the National Labor Relations Act. Section 8(a)(3) of that Act, 29 U.S.C. 158(a)(3) (1958 ed.), declares that it shall be an unfair practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *" As in Title VII, discrimination is not defined in the NLRA, nor

is the Act explicit in requiring that a discriminatory practice be intentional.

In *Republic Aviation Corporation* v. *NLRB*, 324 U.S. 793 (1945), this Court considered whether a claim of impartial, uniform enforcement of an employer's rule might defeat a charge of discrimination raised by employees discharged for union solicitation. Although the employer's rule was a general one prohibiting solicitation of any type in its plant or offices, this Court held (at 805) that

> if the rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of Section 8(3) in that it discourages membership in a labor organization.

While proof of a deliberate intent to discourage or encourage union membership by discrimination is undoubtedly relevant in Section 8(a)(3) cases, it is not essential. This is the express holding of *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954). In one of the proceedings disposed of in that decision, the employer was charged with violating Section 8(a)(3) by giving wage increases to union members, while refusing to give them to non-union members, "on the grounds that it was not contractually bound to do so, and, in its business judgment, did not choose to do so" (at 36). The company relied on the fact that there was no evidence of discriminatory purposes (*ibid*) and the Court noted that the Labor Board had considered "that the employer acted from self-interest and not to encourage unionism" (at 37). Nevertheless, the Court upheld the Labor Board's finding that Section 8(a)(3) had been vio-

lated, saying (at 44) that "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation." The recognition that specific proof of intent was unnecessary where employer conduct "inherently" encouraged or discouraged union membership was said to be "an application of the common law rule that a man is held to intend the foreseeable consequence of his conduct" (at 45). In other words, this Court ruled that certain employer conduct is so inherently destructive of the employee's rights that it is violative of the statute, regardless of motive.

The rationale of the *Radio Officers* case was applied by this Court in *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221 (1963), where it held that a super-seniority system that discriminated against strikers violated Section 8(a)(3) despite the employer's unchallenged assertion that "its overriding purpose in granting super-seniority was to keep its plant open and that business necessity justified its conduct" (at 225-6). This Court said (at 228):

> But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.

Here, of course, respondent knew that its policy discriminated against those whose religious principles prevent them from working on Sundays and from getting replace-

ments, and it must have known and intended the exclusion of such persons from employment.

It is particularly significant that this Court in *Erie Resistor* rested its decision in large part on the Labor Board's analysis of the problem. Upholding the "balance" which the Board had struck between the business interests of the employer and the objectives of the statute, it said (at 236):

> The matter before the Board lay well within the mainstream of its duties. It was attempting to deal with an issue which Congress had placed in its hands and "[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer."

The principles laid down in these cases were reaffirmed and applied by this Court in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (payment of vacation benefits to nonstrikers but not to strikers), and *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) (employment of new employees before rehiring former strikers).

III

This Court should uphold the EEOC's interpretative ruling concerning the employment of Sabbath observers.

A. The 1967 Guidelines

As noted above, this action was started following a ruling by the EEOC that respondent had violated Title VII by its discharge of petitioner. That finding was made pursuant to a policy laid down in an interpretative ruling

which set forth guidelines on discrimination because of religion. The Guidelines, as formulated in 1967 (29 C.F.R. 1605.1), provided in relevant part that "* * * the duty not to discriminate on religious grounds * * * includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employers and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." We submit that this ruling is consistent with the interpretation of the statute, discussed in Point II, above, that the ban on discrimination applies to practices having a discriminatory impact.[4] For the reasons stated in Point I above, it should be upheld by this Court because it represents a reasonable balance between the needs of employers and the statutory objective of equality.

Surely, the employer who refuses to make a reasonable accommodation to the religious needs of his employee, if he can do so without an undue hardship on the conduct of his business, cannot be heard to argue that he does not discriminate. The commonsense significance of his refusal

4. It might be argued that, even if it is necessary under Title VII to show a discriminatory intent as well as a discriminatory impact, the EEOC Guidelines represent a reasonable way of dealing with the difficult problem of proving discrimination. See Note, "An American Legal Dilemma—Proof of Discrimination," 17 U. of Chi. L. Rev. 107 (1949); Lamb, "Proof of Discrimination at the Commission Level," 39 Temple Law Quarterly 299 (1966). On this theory, the EEOC's Guidelines could be viewed as being based on the widespread recognition that employers normally deny discrimination and that it is always difficult to prove it. The absence of evidence of reasonable accommodation could reasonably be treated as creating a rebuttable presumption of discriminatory intent. The employer's obligation to establish undue hardship would be no more than the obligation to rebut the presumption.

establishes the reasonable relationship between the duty not to discriminate and the obligation to accommodate.

The majority below rejected the EEOC's 1967 Guidelines as having the effect of compelling an employer to accede to or accommodate the religious beliefs of his employees. This, it said, raised grave questions under the Establishment Clause.[5] Pet. App. 57a and 58a. While it is true that, under the Guidelines, the burden of proof is on the employer to show an undue hardship upon his business operations, it is inaccurate to speak in terms of coercion or compulsion. The Guidelines require only a "reasonable" accommodation to the religious needs of the employee. The concept of reasonableness, certainly not a novel one in the law, prescribes a standard of behavior which should be possible to apply to individual instances.[6] Placing this obligation on the employer is a far cry from coercion or compulsion.

The employer here was prepared to accept substitutes for those employees who could not work on Sunday because of their religious beliefs. The only further accommodation that would have been required in order to bring

5. This bogey of the Establishment Clause was, we submit, effectively disposed of in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). In *Sherbert*, the Court said:

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.

6. The concept of "reasonable accommodation" also appears in the EEOC's Guidelines on Discrimination Because of Sex. 29 C.F.R. 1604.1.

it within the EEOC regulation was that it find the substitutes itself. There is no evidence to suggest that this would have been impossible or even difficult.

The court below appears to have relieved respondent of the necessity of making this accommodation at least in part because it regarded Dewey's view of his religious obligations as unreasonable. The court recognized, and indeed it was unquestioned, that Dewey regarded the obtaining of replacements as a sin (Pet. App. 49a). It went on to say:

> He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.

This comment has no possible relevance except to throw doubt on either the sincerity of Dewey's belief or the obligation of the court to give it weight.

In raising a question concerning the validity of Dewey's unusually strict view of his Sabbatarian obligations, the Court of Appeals entered territory forbidden to the courts. This was made clear by this Court in *United States* v. *Ballard*, 322 U.S. 78, 87 (1944):

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Dewey's view that he could not obtain replacements even though he could collect wages from an employer who sched-

uled Sunday work may have seemed "incredible, if not preposterous," to the Court of Appeals. But the court could not properly base its decision on that conclusion.

B. The 1966 Guidelines

The court below regarded the EEOC's Guidelines as now embodied in 29 C.F.R. 1605.1 as inapplicable to the present case because they were adopted in June 1967, after Dewey was discharged. It found that the earlier version of 1605.1, adopted on June 9, 1966 (31 Fed. Reg. 8370) was significantly different. We submit that, even if the 1967 Regulation is held inapplicable to Dewey, the 1966 version also required an accommodation to the reasonable religious needs of an employee where that could be made without serious inconvenience to the conduct of the business.

Circuit Judge Combs, in dissenting from the majority view, correctly pointed out that "the cornerstone of both the 1966 and 1967 Regulations is the obligation of the employer to accommodate the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business." See 1605.1(a)(2) of 1966 Regulation and 1605.1(b) of 1967 Regulation. In the 1966 Regulation, the obligation was to "accommodate the reasonable religious needs" of employees where that could be done without "serious inconvenience." The 1967 Regulation on the other hand, speaks in terms of a "reasonable accommodation" and "undue hardship." We maintain that these variations in language indicate that the employer's obligation under the 1966 interpretation was at least as stringent as under the 1967

interpretation, and possibly more stringent. Nevertheless, the majority below reasoned that the obligation to accommodate was "restricted" by the provisions of Sections 1605.1(a)(3) and 1605.1(b)(3) in the 1966 version, which were apparently thought controlling in Dewey's case.

A closer examination, however, yields the conclusion that those sections referred to by the majority are not dispositive of Dewey's case. Section 1605.1(a)(3), it should be noted, relates to a "normal" work week, not compulsory overtime. Section 1605.1(b)(3) declares that an employee who accepts a job knowing that its requirements would conflict with his religious obligations is not entitled to demand an accommodation. Under the stipulated facts, Dewey was employed by Reynolds in various capacities since 1951. Although Dewey became a member of the Faith Reformed Church in 1961, a year following the Labor Agreement between Reynolds and the Union which allowed Reynolds to set compulsory overtime schedules, it was not until 1964 that the plant operated on a "five plus" schedule, utilizing Saturdays as overtime, and not until late 1965 and 1966 that the plant operated on a "six plus" schedule, utilizing Saturdays regularly and numerous Sundays. See Stipulation of Facts, paragraphs 1, 3, and 7. Dewey's conflict between his religious needs and his employer's requirements thus arose long after he came to work for Reynolds, and long after his conversion to the Faith Reformed Church.[7]

7. Under the 1960 Labor Agreement and subsequent agreements between the union and Reynolds, employees could be exempted from compulsory overtime schedules for a "substantial and justifiable reason." Stipulation of Facts, Paragraph 7. Even accepting the majority's reliance upon Section 1605.1(b)(3), the rights vested in Dewey by the Labor Agreement were entitled to recognition.

Under the 1966 Guidelines, therefore, as well as under the 1967 version, Dewey was entitled to have the employer make the small accommodation to his religious faith that would have enabled him to continue working without violating his religious principles.

Conclusion

It is respectfully submitted that the court below erred in holding that Title VII of the Civil Rights Act of 1964 does not bar employer policies that discriminate against employees by failing to make reasonable adjustments to their religious principles.

Respectfully submitted,

PAUL S. BERGER
JOSEPH B. ROBISON
Attorneys for
American Jewish Congress, *Amicus Curiae*

BEVERLY COLEMAN
Of Counsel